BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DARLA BECK	)	
Claimant	)	
VS.	)	
	)	Docket No. 253,248
MCI BUSINESS SERVICES	)	
Respondent	)	
AND	)	
	)	
ZURICH INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the November 19, 2001 Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Board heard oral argument in Wichita, Kansas, on April 12, 2002.

APPEARANCES

Brian D. Pistotnik of Wichita, Kansas, appeared for claimant. Stephen J. Jones of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for an August 20, 1999 accident when claimant fell at an awards banquet and injured her back. In the November 19, 2001 Award, Judge Barnes determined claimant sustained a 54 percent wage loss and a 25 percent task loss, creating a 39.5 percent work disability (a permanent partial general disability greater than the functional impairment rating).

Respondent and its insurance carrier contend Judge Barnes erred. They first argue claimant's accident did not arise out of her employment with respondent because it happened at a social event. Next, they argue the Judge should have disregarded Dr. Pedro A. Murati's opinion that claimant sustained a 50 percent task loss and, instead, the Judge should have adopted Dr. Philip R. Mills' opinion that claimant had no such loss. Finally, they argue claimant's wage loss should be only 46 percent as they contend claimant's pre-injury and post-injury average weekly wages are $839.97[1] and $453.85,[2] respectively, rather than the $900.78 and the $412.50 figures used by the Judge in calculating the wage loss.

In their brief to the Board, respondent and its insurance carrier request the Board to deny claimant's request for benefits. In the alternative, they request the Board to reduce claimant's permanent partial general disability either to 23 percent (which is an average of a 46 percent wage loss and a zero percent task loss) or to the five percent functional impairment rating provided by Dr. Mills.

Conversely, claimant contends the Award should be affirmed. However, claimant points out in her brief to the Board that she actually earned $420.52 per week while working for Sure-tel for a three-month period from August to November 2000, but commencing January 2, 2001, began earning $412.50 per week working for Together Dating. Accordingly, claimant's actual wage losses for those periods are 53.3 percent and 54 percent, respectively. But, more importantly, claimant notes it is unnecessary to modify the Award to reflect claimant's actual wage loss before January 2, 2001, as such change would not affect either the total number of weeks of benefits awarded or the weekly compensation rate.

The issues before the Board on this appeal are:

1. Did claimant's accident occur at a recreational or social event where claimant was under no duty to attend?

2. If not, what is the nature and extent of claimant's injury and disability? In addressing that general issue, the Board must determine claimant's pre- and post-injury average weekly wages, along with determining whether claimant is entitled to a work disability, and claimant's task loss, if applicable.

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[1] Respondent and its insurance carrier contend claimant's customary workweek was 30 to 36 hours per week, not the 40-hour workweek used by the Judge in calculating claimant's pre-injury average weekly wage.

[2] Respondent and its insurance carrier contend claimant was earning $403.85 per week straight time, plus $50 per week in bonus, while working for Sure-tel after being terminated by respondent.

FINDINGS OF FACT

After reviewing the entire record, the Board finds:

1. Claimant began working for respondent in November 1995 as an inside sales representative. Claimant's job required her to telephone businesses and sell them long distance service.

2. On August 20, 1999, claimant injured her back when she missed a chair and fell at an awards banquet conducted by respondent. Claimant's testimony is uncontradicted that she was required to attend. Claimant immediately reported the accident.

3. Respondent and its insurance carrier provided medical treatment for claimant, which consisted of medications and physical therapy. With treatment, the symptoms in claimant's neck and upper back resolved, but the symptoms in her lower back and the numbness in her left leg from the knee to the hip did not.

4. Following the accident, claimant continued working for respondent until she was terminated on approximately February 9, 2000, for failing to verify a sale.

5. Following her termination from respondent, claimant drew unemployment benefits. But in August 2000 claimant began working as a manager for a telephone company, Sure-tel. Claimant held that job for approximately three months until the company closed all its Kansas stores in November 2000. Claimant was then unemployed until January 2, 2001, when she began working for Together Dating, a personal introduction service, as an appointment scheduler. At the time of the January 2001 regular hearing, claimant had worked for Together Dating for approximately four weeks.

6. Respondent and its insurance carrier hired board-certified physical medicine and rehabilitation specialist Philip R. Mills, M.D., to evaluate claimant for purposes of this claim. The doctor saw claimant in November 2000 and diagnosed sacroiliac strain that he felt was caused by the August 1999 accident. According to Dr. Mills, claimant has a five percent whole body functional impairment under the fourth edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*. But Dr. Mills did not believe that claimant had lost any ability to perform work tasks due to the accident as it is her large size rather than any physical injury that restricts her abilities. Dr. Mills believes there would not be any new restrictions that he would place on claimant because of the accident that he would not have placed on her before the accident due to her size and preexisting lumbar lordosis.

7. Claimant's attorney hired Pedro A. Murati, M.D., to evaluate claimant for this claim. Dr. Murati, who is also a physical medicine and rehabilitation specialist, examined claimant

in August 2000 and diagnosed left sacroiliac joint dysfunction and lumbar strain, which he rated as an 11 percent whole body functional impairment. The doctor also believes claimant should be restricted to occasionally bending, climbing stairs and ladders, squatting and crawling. Further, the doctor would also restrict claimant from more than frequent sitting, standing or walking, and that claimant should alternate those positions. Finally, Dr. Murati would restrict claimant from lifting, carrying, pushing or pulling more than 35 pounds occasionally, 20 pounds frequently, and 10 pounds constantly.

8. During his deposition, Dr. Murati reviewed a list of former work tasks prepared by vocational counselor Karen Crist Terrill and the doctor indicated that claimant should not perform approximately 17 of 34, or approximately 50 percent, of the nonduplicative tasks. In formulating that opinion, however, the doctor in some instances considered his personal experiences in performing similar tasks and considered physical requirements that were more strenuous than the description of the task that was provided by Ms. Terrill. Had the doctor restricted his opinion to the task descriptions provided by Ms. Terrill, the Board finds that Dr. Murati's task loss opinion would have been reduced to approximately 26 percent, representing a loss of nine of the 34 former work tasks that claimant performed in the 15 years immediately preceding the date of accident.

9. The only other doctor to testify was one of claimant's treating physicians, Mark S. Dobyns, M.D. Dr. Dobyns, who is an internal and occupational medicine specialist, treated claimant from August 23, 1999, through early December 1999. Although the doctor initially restricted claimant from lifting more than 15 pounds and from overhead reaching and repetitive bending, claimant was able to perform her telemarketer job. And in November 1999, the doctor released claimant to return to work without any restrictions. Dr. Dobyns' final diagnosis was lumbar sprain on the left with possible nerve root irritation. When Dr. Dobyns last saw claimant in December 1999, the doctor did not believe claimant had reached maximum medical improvement. The doctor was not asked to evaluate claimant to determine the extent of her functional impairment.

10. The Board finds that claimant's functional impairment rating lies somewhere between the five percent rating provided by Dr. Mills and the 11 percent rating provided by Dr. Murati. Accordingly, the Board finds and concludes that claimant has an eight percent whole body functional impairment rating due to the August 1999 accident. The Board also finds and concludes that claimant should avoid constant sitting, standing and walking, and should alternate those positions as needed. Additionally, claimant should observe the lifting restrictions placed upon her by Dr. Murati.

11. From the date of accident through approximately February 9, 2000, claimant continued working for respondent and, therefore, made a wage that was comparable to the wage that she was earning on the date of accident. Therefore, claimant has a zero percent wage loss for that period.

12. Claimant's average weekly wage for the date of accident is $900.78. Claimant's base wage is $336.80, which is determined by multiplying her hourly rate of $8.42 by the 40 hours per week that she was regularly scheduled to work.[3] The base wage is then added to the $7.67 per week in overtime pay that claimant received, the $15.62 per week in bonus pay that claimant received and the $540.69 per week in commissions that she earned. The record does not disclose the value of any additional compensation items that claimant received while working for respondent.

13. From February 10, 2000, until approximately August 1, 2000, claimant was unemployed. Claimant's testimony is uncontradicted that during that period she was drawing unemployment benefits but also looking for work. Accordingly, for that period, the difference in claimant's pre- and post-injury wages was 100 percent.

14. For the period from approximately August 1, 2000, until approximately November 1, 2000, claimant was working for Sure-tel earning the equivalent of $21,000 per year in salary, plus commissions of $16.67 per week. In that job, claimant also received health, life, vision and dental insurance. The record does not disclose the value of those additional compensation items. Accordingly, for that period the record establishes an approximate weekly wage of $420.52, which creates a wage loss of 53 percent.

15. For the period from approximately November 1, 2000, through January 1, 2001, claimant was again unemployed and, therefore, again had a 100 percent wage loss.

16. Finally, for the period commencing January 2, 2001, claimant began earning $400 per week in salary from Together Dating, plus $12.50 per week in commissions. Therefore, claimant's average weekly wage commencing with that employer is $412.50 per week. Claimant testified that she would qualify for some additional compensation items after working for 90 days, but the value of those benefits is not included in the record and had not commenced when claimant testified at the regular hearing. Accordingly, commencing January 2, 2001, claimant has a 54 percent wage loss.

CONCLUSIONS OF LAW

1. The Award should be modified as explained below.

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[3] Claimant was a full-time worker as defined by K.S.A. 44-511(a)(5) (Furse 1993), who was regularly scheduled to work 40 hours per week. Accordingly, claimant's straight-time weekly rate is determined by using 40 hours. See K.S.A. 44-511(b)(4) (Furse 1993).

2. Respondent and its insurance carrier have argued that claimant's accident did not arise out of and in the course of employment as it allegedly occurred at a social event. The Board finds that argument disingenuous.

The Workers Compensation Act provides, in part:

> The words, "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to employees while engaged in recreational or social events under circumstances **where the employee was under no duty to attend** and where the injury did not result from the performance of tasks related to the employee's normal job duties or as specifically instructed to be performed by the employer.[4] (Emphasis added.)

The evidence is uncontradicted that claimant was required to attend the awards banquet at which she was injured. Accordingly, the exclusion set forth in K.S.A. 1999 Supp. 44-508(f), above, does not apply.

3. Because claimant's injuries comprise an "unscheduled" injury, her permanent partial general disability is determined by the formula set forth in K.S.A. 1999 Supp. 44-510e. That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[5] and *Copeland*.[6] In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption against work disability as

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[4] K.S.A. 1999 Supp. 44-508(f).

[5] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[6] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wages should be based upon the ability to earn wages rather than actual wages received when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[7]

4. Claimant was fired for allegedly failing to verify an order for services. The Board concludes that claimant has not attempted to manipulate her workers compensation award or otherwise engaged in activity that is tantamount to refusing to work, as is addressed by *Foulk*. Despite the fact that claimant did not engage in conduct that could be considered tantamount to bad faith, claimant lost her job with respondent, leaving her in the open labor market and competing for employment with workers who have no impairments or medical restrictions. These facts are distinguishable from *Foulk*. Further, under these facts, there are no public policy concerns to justify ignoring the plain language of K.S.A. 1999 Supp. 44-510e.

5. The Board concludes claimant has made a good faith effort to find work during her periods of unemployment. Accordingly, claimant's actual wages should be used for determining her permanent partial general disability.

6. Considering the entire record, the Board believes claimant's task loss falls somewhere between Dr. Mills' zero percent task loss percentage and Dr. Murati's 50 percent task loss percentage. Accordingly, the Board concludes claimant has sustained a 26 percent task loss due to the August 1999 accident. Averaging that task loss with the various differences in pre- and post-injury wages following the accident as set forth in the findings above, claimant has the following percentages of permanent partial general disability:

> For the period from August 20, 1999, through February 9, 2000, claimant has no wage loss and, therefore, her permanent partial general disability is based upon her eight percent functional impairment rating.

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[7] *Copeland*, at 320.

For the period from February 10, 2000, until August 1, 2000, claimant has a 100 percent wage loss and a 26 percent task loss, which creates a 63 percent work disability.

For the period from August 1, 2000, until November 1, 2000, claimant has a 53 percent wage loss and a 26 percent task loss, which creates a 40 percent work disability.

For the period from November 1, 2000, through January 1, 2001, claimant has a 100 percent wage loss and a 26 percent task loss, which creates a 63 percent work disability.

And finally, for the period commencing January 2, 2001, claimant has a 54 percent wage loss and a 26 percent task loss, which creates a 40 percent work disability.

7. The Board adopts the findings and conclusions set forth in the Award that are not inconsistent with the above.

AWARD

WHEREFORE, the Board modifies the November 19, 2001 Award entered by Judge Barnes, as follows:

Darla Beck is granted compensation from MCI Business Services and its insurance carrier for an August 20, 1999 accident and resulting disability. Based upon an average weekly wage of $900.78, Ms. Beck is entitled to receive the following disability benefits:

For the period from August 20, 1999, through February 9, 2000, 24.71 weeks of benefits are due at $383 per week, or $9,463.93, for an eight percent permanent partial general disability.

For the period from February 10, 2000, through July 31, 2000, 24.71 weeks of benefits are due at $383 per week, or $9,463.93, for a 63 percent permanent partial general disability.

For the period from August 1, 2000, through October 31, 2000, 13.14 weeks of benefits are due at $383 per week, or $5,032.62, for a 40 percent permanent partial general disability.

For the period from November 1, 2000, through January 1, 2001, 8.86 weeks of benefits are due at $383 per week, or $3,393.38, for a 63 percent permanent partial general disability.

For the period commencing January 2, 2001, 94.58 weeks of benefits are due at $383 per week, or $36,224.14, for a 40 percent permanent partial general disability and a total award of $63,578.

As of May 15, 2002, claimant is entitled to receive 142.71 weeks of permanent partial general disability compensation at $383 per week in the sum of $54,657.93, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $8,920.07 shall be paid at $383 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of May 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Brian D. Pistotnik, Attorney for Claimant
Stephen J. Jones, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Workers Compensation Director